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October 5, 2000

BY HAND DELIVERY

U.S. Department of Transportation Dockets
Docket No. FAA-00-7018
400 Seventh Street, S.W.
Room Plaza 401
Washington, D.C. 20590

RE: Fees for FAA Services for Certain Flights – Docket No. FAA-00-7018 -90

Dear Sir or Madam:

Enclosed please find two copies of the "Supplemental Comments of the Air Transport Association of Canada ("ATAC") to the Interim Final Rule Imposing New Overflight Fees" for inclusion in the Docket in this matter.

Sincerely,

Roy Goldberg
Counsel for Air Transport Association of Canada

Enclosures

cc: Mr. Michael Skrobica -- ATAC

BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

FEES FOR FAA SERVICES FOR CERTAIN FLIGHTS	)	*Docket No. FAA-00-7018* Interim Final Rule issued May 30, 2000

SUPPLEMENTAL COMMENTS OF AIR TRANSPORT ASSOCIATION OF CANADA TO INTERIM FINAL RULE IMPOSING NEW OVERFLIGHT FEES

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DATED: October 5, 2000

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INCORPORATION BY REFERENCE OF PRIOR SUBMISSIONS

The Air Transport Association of Canada (***ATAC***), on behalf of its members,[1] submits these "Supplemental Comments" on FAA's Interim Final Rule issued May 30, 2000, that sets forth new fees on overflights, *i.e.*, flights that transit United States airspace but neither take off nor land in the United States. Pursuant to the Interim Final Rule, which was issued without prior notice to, or an opportunity to comment by, affected parties, these fees became effective August 1, 2000, and are now being collected by the FAA. The comments below supplement the submissions that ATAC and others have already made in this Docket and which are hereby incorporated by reference, without limitation, including the following:

1) "Preliminary Objections and Comments of Air Transport Association of Canada ('ATAC') to Second Fee Schedule for Overflights," June 29, 2000, Docket Entry No. FAA-2000-7018-36 (***Preliminary Objections***).

2) "KPMG Preliminary Conclusions Regarding FAA's Methodology for Setting Fees in Second Fee Schedule," June 29, 2000, Docket Entry No. FAA-2000-7018-37 (***KPMG I***).

3) "Transcript of Federal Aviation Administration Public Meeting on Interim Final Rule Establishing Fees for FAA Services for Certain Flights," June 29, 2000, Docket Entry No. FAA-2000-7018-48 (***Public Meeting Transcript***).

4) "Declaration of Joseph A. Beaudoin," July 19, 2000, Docket Entry No. FAA-2000-7018-50 (***Beaudoin Declaration***).

5) "KPMG Supplemental Report Regarding FAA's Methodology for Setting Fees in Second Fee Schedule," July 26, 2000, Docket Entry No. FAA-2000-7018-62 (***KPMG II***).

6) Letter to FAA Administrator Jane Garvey, July 27, 2000, Docket Entry No. FAA-2000-7018-63 (***July 27 Letter***).

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[1] ATAC's member airlines include Air Canada, Air Nova, Air Ontario, Air Transat, Canada 3000, Canadian Airlines, Kelowna Flightcraft, Royal Aviation, Skyservice, WestJet Airlines and Transport Canada.

7) "Declaration of Michael Jengo," July 28, 2000, Docket Entry No. FAA-2000-7018-67 (***Jengo Declaration***).

It is unnecessary to reiterate in this submission all of the arguments and statements set forth in these prior submissions. However, since the June 29, 2000 Public Meeting held by FAA, ATAC has received additional information that reinforces its Preliminary Objections, and which otherwise deserves comment in this document. In addition, certain aspects of the FAA's Interim Final Rule merit further attention in these comments. Further, KPMG is today making a supplemental submission to the Docket – "Analysis of FAA's Methodology Used for Setting Overflight Fees in Interim Final Rule Dated May 30, 2000" (***KPMG III***), and that submission is also incorporated by reference herein.

ATAC'S SUPPLEMENTAL COMMENTS

To begin with, we reiterate that the FAA's promulgation of the new overflight fees via an Interim Final Rule without prior notice to or comment from affected parties constituted a clear violation of the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* (***APA***). For this reason alone, the new overflight fees were unlawfully promulgated and must be withdrawn. This fundamental defect in the Interim Final Rule was set forth in detail in ATAC's Preliminary Objections and in the July 27 Letter to Administrator Garvey, and is summarized in Section VII below. First, we comment on many of the substantive flaws in the Interim Final Rule.

I. The new overflight fees fail to comply with the express statutory requirement in 49 U.S.C. 45301(b)(1)(B) that FAA "ensure that each of the [overflight] fees" imposed on overflying aircraft be "directly related to the Administration's costs of providing the service rendered" to the overflying aircraft.

The United States Court of Appeals for the D.C. Circuit has emphasized that, under the governing statute, the overflight fees "must be established in such a way that ***each flight pays*** according to ***the burden associated with servicing that flight***." *Asiana Airlines et al. v. FAA*, 134 F.3d 393, 402 (D.C. Cir. 1998) (emphasis added). The court subsequently reaffirmed that the FAA may not adopt a fee-methodology which "write[s] out of the statute the requirement that '*each* of the fees' be 'directly related' to the cost of providing the service rendered.'" *Air Transport Association of Canada v. FAA*, 156 F.3d 1329, 1332 (D.C. Cir. 1998) (emphasis in original).

Under the FAA's new overflight fee rule, it is clear that overflights are being charged fees far in excess of the cost burden FAA incurs in providing air traffic control and related services (***ATC Services***) to overflights. Put another way, under the new fees, overflights are being required to substantially subsidize the costs incurred by FAA to provide ATC Services to non-overflights. KPMG III, at 1-2, 4-10.

The primary reason for this unfortunate – and unlawful – result is that the FAA adopted the totally unfounded assumption that FAA's purported average per-unit cost for providing ATC Services to all aircraft (***Average Cost***) is a proper surrogate for FAA's average per-unit cost to provide ATC Services to overflights (***Overflight Cost***). FAA has presented no data whatsoever – much less any reliable, scientific data – to support the assumption that Average Cost is an appropriate surrogate for Overflight Cost. Instead, FAA simply made the bald assertion that "the unit costs of providing ATC services to

overflights within each environment is [sic] identical to the unit costs of providing ATC services to all air traffic within each environment." FAA Overflight Fee Development Report, May 26, 2000 (***Fee Development Report***) at 9. This assumption pervades the Fee Development Report. *See, e.g., id.* ("the level of ATC Services are assumed identical for all aircraft operations within a particular environment (i.e., enroute or oceanic)"); and *id.* at 7 ("the cost of providing service for overflights is the same as for any other aircraft operation within the enroute and oceanic environments").

There are two fundamental flaws with this assumption. The first is that FAA's Average Cost to provide ATC Services on a per-mile basis to all aircraft operating within a particular environment (*i.e.*, enroute or oceanic) is substantially higher than its average cost on a per-mile basis to provide ATC Services to overflights operating in that same environment. ATAC and other parties have submitted unrebutted evidence that, on average, non-overflights are much more costly for FAA to handle in both the enroute and oceanic environments.

In the enroute environment, it is clear that FAA incurs a relatively high level of costs, in labor and other expenses, to provide ATC Services to aircraft which operate in the lower altitude sectors (between 10,000 and 17,999 feet) either: 1) for their entire duration within the enroute environment (***Low Altitude Flights***); or 2) while they are transitioning between the terminal environment (which encompasses airports with air traffic control towers) and the high altitude sectors (18,000 feet and above) (***Transitional Flights***). Beaudoin Declaration ¶ 3(b). The "process for a Center controller to handle aircraft operating in the lower altitude sectors is extremely labor intensive." *Id.* ¶ 10. Low Altitude and Transitional Flights "require a high level of FAA controller attention

and contacts with radar facilities because they occur within airspace: 1) in which aircraft are constantly requesting or requiring clearance to change altitude; 2) that is often congested, and 3) which is frequently affected by weather problems and airport delays." *Id.* ¶¶ 9-16. Low Altitude and Transitional Flights also require a relatively high level of FAA resources through the provision of Remote Communications Air/Ground Facilities and /or Remote Communications Outlets. *Id.* ¶ 14.

By contrast, the FAA's provision of ATC Services to overflights in the enroute sector is not labor intensive. Controllers assigned to handle overflights "typically have only two, brief voice communications with the cockpit (once when the aircraft enters the sector being handled by that controller, and once when the aircraft departs the sector)." *Id.* ¶¶ 3(b) and 8. In addition, overflights require no services, facilities or equipment beyond what the FAA uses to serve aircraft within the lower altitude sectors. *Id.* ¶ 3(b). In fact, overflights require much less in the way of services and equipment than Low Altitude and Transitional Flights. *Id.*

Similarly in the oceanic environment the FAA also incurs a materially lower level of costs to provide ATC Services to overflights than to non-overflights. "There is a significant difference in the level of ATC services provided to an overflight that traverses oceanic non-radar airspace and a flight that lands or departs a U.S. airport." Jengo Declaration, at 2-3. "[A]n oceanic flight landing or departing a U.S. airport will require more manpower and equipment resources than an oceanic flight that only transits U.S. airspace." *Id.* at 3.

The second basic flaw in the FAA's assumption is that it ignores the fact that (more costly) non-overflights comprise the vast majority of aircraft operations within a

particular environment. As demonstrated in the Fee Development Report, at Tables 3 and 5, in FY 1999, overflights accounted for only 1.25% of total flights in the enroute environment, and only 11.6% of total flights in the oceanic environment. *See also* Beaudoin Declaration ¶ 3(a). The practical effect is that the use of Average Cost to set overflight fees necessarily results in fees that grossly exceed FAA's costs attributable just to overflights. In other words, the FAA's use of Average Cost to set overflight fees is especially unfair because the average is dominated by both the high costs, and high numbers of non-overflights vis-à-vis the low costs, and low numbers of overflights. For these reasons, it is clear beyond question that the FAA's new overflight fees are not "directly related" to FAA's provision of ATC Services for overflights. *See* KPMG III, at 1-2, 4-10.

II. Although the FAA is expressly obligated by statute to develop fees that are "directly related" to FAA's costs to provide ATC Services to overflights, FAA did not adopt a fee-setting methodology which even purported to identify and measure the FAA's actual costs to provide ATC Services to overflights.

In establishing the overflight fees FAA relied on a cost study performed by Arthur Andersen (***Andersen)*** that was not even developed with overflight fees in mind. The "Costing Methodology Report" prepared by Andersen examined only two of four FAA "Lines of Business" – the provision of ATC Services in the enroute and oceanic environments, respectively. As set forth in its study, "Andersen did not participate in any FAA process to determine any user fees based on [its] costing methodology."[2] At no time did Andersen attempt to apply the analysis it performed to try to determine FAA's actual costs to provide ATC Services to overflights. Further, there is nothing in the

[2] Andersen Report, at iii.

record to indicate that the FAA sought to identify the FAA's actual costs to provide ATC Services to overflights in any other manner. Certainly no information in this respect is included in the FAA Fee Development Report. Consequently, it is clear that there has been no attempt to marshal and analyze the relevant empirical data to determine FAA's actual costs for overflights.

What did FAA's "methodology" for setting overflight fees consist of? It appears to be little more than taking the Andersen results and applying them -- without scientific or critical scrutiny of any kind -- to the question of "what are FAA's actual costs to provide ATC Services ***to overflights***." Obviously, FAA would not uncritically assume that performance criteria of a Boeing 747 are identical to those of a Cessna 170; however, this is the type of baseless assertion that FAA has relied on for its assumption that Average Cost equals Overflight Cost.

In order to comply with the statutory directive that its fees be "directly related" to its costs, FAA was required to identify and measure its actual costs to provide ATC Services to overflights, and to use that data as a basis for the new fees. FAA simply has not done so.

III. Given that there are accepted methods by which FAA could measure its overflight costs and base the fees accordingly, it was arbitrary and capricious for FAA not to use such a methodology.

As reflected in KPMG III, there was an expedient way for FAA to determine its actual costs to provide ATC Services to overflights, but FAA failed to employ such methodology. "Activity Based Costing" (***ABC***) is a well-recognized, standard cost accounting methodology that the FAA could have used to determine its costs directly

related to the provision of ATC Services to overflights. *See* KPMG III, at 11-16. ABC provides an accounting methodology that can be used to establish the costs that FAA incurs to provide ATC Services for overflights. ABC allows for the apportionment of the costs of resources to those specific activities that the resources support. KPMG III, at 12. The apportionment reflects the level of resources consumed by each activity. FAA's failure to employ this accepted methodology – or any alternative methodology for that matter – to specifically measure, or even estimate, its overflight costs is patently arbitrary, capricious and a violation of the statutory requirement that FAA's overflight fees be "directly related" to FAA's overflight costs. Under the statute, FAA cannot promulgate overflight fees without knowing, or at least having a reliable estimate of, its overflight costs. Yet FAA never even attempted to discern those costs.

As an alternative, however, if (as unlikely as it seems) FAA does have some information or documentation that it believes supports its assumption that Overflight Cost is equal to Average Cost, then it was arbitrary and capricious for FAA not to include its alleged substantiation for this assumption within the Fee Development Report, the Interim Final Rule, or at some other place in the Docket. In the Preliminary Objections of ATAC, and in various comments made during the Public Meeting by speakers on behalf of ATAC and various air carriers, FAA was notified that FAA had given no substantiation for this assumption. *See, e.g.,* Preliminary Objections, at 18, and Public Meeting Transcript generally. Despite requests that it provide the public with substantiation for such an assumption, FAA never did so. This should be contrasted with the submissions by ATAC and other carriers of the Beaudoin and Jengo Declarations

which contain unrebutted evidence that Average Cost is not a proper surrogate for Overflight Cost.

IV. FAA has acted arbitrarily and capriciously by failing to disclose to interested parties numerous critical assumptions and other information underlying its fee setting methodology.

Soon after the IFR was published, it became clear to ATAC and other affected parties that FAA had failed to provide sufficient information to comprehend fully how the FAA had derived the overflight fees. Consequently, the parties requested critical pieces of information, including the following, all of which FAA has still failed to provide:

1. The evidentiary basis for the FAA's use of its average cost on a per-mile basis to provide ATC services to *all aircraft* within a particular environment (*e.g.,* enroute or oceanic) as a surrogate for FAA's average per-mile cost to provide ATC services to *overflights* operating within that environment.

2. The factual predicate for FAA's critical assumption that "the unit costs of providing ATC services to overflights within each environment is identical to the unit costs of providing ATC services to all air traffic within each environment."

3. The data and methods FAA used to determine the figure that purportedly represents FAA's total cost pool.

4. The data and methods FAA used to allocate its total cost pool across the various FAA services.

5. The justification for including in the cost pool large amounts of costs for system implementation and capital acquisition that were "expensed" in a single year rather than "capitalized" over a multi-year period.

6. A description of the activities that FAA has assumed occur within each cost center to explain why FAA made certain cost assignments to the four ATC service environments.

7. The total pool of costs associated with each cost element, and the allocation of those cost elements across the four services.

8. The manner in which FAA has allocated the costs it incurs in transitioning aircraft between the oceanic and enroute environments.

9. The basis for the assumption that the costs associated with each facility are uniquely related to a specific "Service Delivery Point" (***SDP***).

10. The basis for the assumption that all labor costs in a specific SDP that provides enroute and/or oceanic services are actually directly related to the provision of enroute and/or oceanic services by that SDP.

11. The basis for the FAA's allocation of telecommunications costs in the costs pools used to set the overflight fees.

12. Historical data regarding workers' compensation claims to determine the nature of their distribution between the services.

13. The basis on which to determine the reasonableness of the use of a single set of "on-position" "time ratios" to allocate a broad spectrum of costs between the enroute and oceanic environments.

14. The basis for the allocation of internal FAA telecommunications costs to the oceanic service.

15. The basis for the allocations of capital investment costs based on project or program coding, and the assumptions made in making such allocations.

16. The basis for the percentages used to allocate certain individual cost elements, such as "Contract Maintenance."

17. An explanation of the amount of overhead costs FAA purports to have removed from the cost pools to determine the overflight fees.

18. The basis for the principles used to determine what types of costs are included in overhead.

19. An activity analysis associated with overflights in both the enroute and oceanic environments along with a cost driver analysis indicating how best to allocate costs to each activity.

20. The basis for cost differences between SDPs, or an explanation of the reason why costs were not allocated between overflights and U.S. originating/terminating flights at individual SDPs, in order to capture differences in costs in different portions of U.S. airspace.

21. The basis for the cost differences between SDPs, or any explanation of why the extensive flight data available was not used to determine a reliable allocation of

costs, despite the statement in the Andersen Report that "automation systems readily track events related to [ATS] services."

22. An analysis of the costs associated with billing and collection of overflight fees, or any discussion of the rationale for charging such fees on a per-mile basis.

23. A description of the organizational structure of ARTCC and the proportion of staff and facilities allocated for jobs handling low-altitude aircraft vs. high-altitude aircraft.

24. Provision of details supporting costs classified as "Capital Investment Expense" and an explanation of whether these are dedicated to ATC services.

25. Evidence that the "R&D" expenses are "directly related" to the provision of ATC services.

26. An explanation of how incremental costs associated with Procedural Airspace control were derived.

See also KPMG III, at 25-28; Preliminary Objections, at 21-23; and the Public Meeting Transcript (*passim*).

All of this information was requested by ATAC in its Preliminary Objections (at 21-23) and/or by ATAC and/or various other parties during the June 29 Public Meeting. KPMG on June 29, 2000 requested 20 separate items of information from the FAA. KPMG I, at 6-16. As set forth in our July 27 Letter to Administrator Garvey, "[m]any parties at the Public Meeting also requested, both orally and in writing, additional information, explanation and clarifications concerning the methodology behind the new fees. . . . This information is critical to obtaining a clear understanding of the methodology used by FAA to set the fees and to enable interested parties to prepare fully-informed and comprehensive comments. During the Public Meeting, the FAA representatives provided none of the requested information. The Form Letters [which FAA had sent to ATAC and other parties] also provide[d] none of this information." In

the more than two months since that letter was sent, FAA has still not provided any of the requested information.

The failure of FAA to disclose this critical information underlying the means by which FAA set the new overflight fees has improperly restricted the ability of ATAC and other interested parties to fully comprehend the FAA's methodology and comment upon it. It is well recognized that "[t]o suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether." *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977). "For unless there is common ground, the comments are unlikely to be of a quality that might impress a careful agency. The inadequacy of comment in turn leads to the direction of arbitrary decision-making." Thus in *Novia Scotia Food Products*, FDA's "failure to disclose to interested persons the scientific data upon which the FDA relied was procedurally erroneous." *Id.*

This principle has been echoed in a long line of cases. See, e.g., *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1018, 1023-24 (2d Cir. 1986) (an agency's action will be set aside as arbitrary and capricious if it "used critical, yet unpublished, data to reach its conclusions"); *National Crushed Stone Ass'n v. EPA*, 601 F.2d 111 (4th Cir. 1979), *rev'd on other grds,*. 449 U.S. 64 (1980) ("an agency engaged in rule making must 'explicate fully its course of inquiry, its analysis and its reasoning'"); *Central and Southern Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 739 (D.C. Cir. 1985) ("[t]o avoid the pitfall of arbitrariness . . . the [agency] is obligated to set forth a more thorough and reasoned explanation of the . . . costs"); *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982) (agency may

not "play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport"; "agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary"); *Portland Cement Ass'n v. Ruckelhaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) ("[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency").

V. In setting the overflight fees, FAA has made several other untenable assumptions.

In its latest report, KPMG has identified a number of unsubstantiated assumptions made by the FAA in the course of developing the new overflight fees. *See* KPMG III, at 16-25. Examples of such unsupported (and in some cases nonsensical) assumptions include, *inter alia*: 1) that all of FAA's costs in FY 1999 would recur in subsequent years despite the fact that some items, such as extraordinary expenditures to deal with the Y2K computer issue, will clearly not recur; 2) that various items which will be used by FAA over the course of more than a single year must nevertheless have been "expensed" during the year on which FAA has based its cost calculation (*i.e.*, FY 1999) rather than "capitalized," as would occur under customary accounting principles; 3) that FAA labor costs at each service delivery point are an accurate basis for allocating non-labor costs and workers compensation claims costs, whereas in reality, non-labor costs and workers' compensation costs often vary substantially as a percentage of personnel compensation; 4) that the level of services provided to each flight is the same regardless of the portion of

U.S. controlled airspace transited by the flight; and 5) that the level of services provided to each flight is the same on a per-mile basis regardless of the number of sectors transited by the flight.[3]

FAA is obligated under the APA to have a reasonable basis for critical assumptions that underlie its fee-setting methodology. As shown above, FAA has failed to meet this standard by relying on numerous assumptions that are plainly false or unsupported. Consequently, the IFR is arbitrary and capricious and contrary to the governing law.

VI. The Interim Final Rule improperly fails to explain the reason why FAA's most recent statement of its purported "costs" for overflights is so markedly different from other recent FAA estimates of its purported "costs" for overflights.

Although the Fee Development Report asserts that FAA incurs costs of approximately $48.7 million for overflights, the credibility of this figure is challenged by the various differing pronouncements FAA has made regarding its purported "costs" to provide ATC Services for overflights. At various times over the past three years, FAA has represented that its annual "costs" for overflights were $12.6 million,[4] $32 million,[5]

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[3] FAA also erroneously included within the costs allocated to the enroute environment costs incurred by FAA to provide ATC Services to aircraft that are landing or taking off at airports that lack air control towers. Such aircraft are not operating within the enroute (or the oceanic) environment. Thus, it is clear that overflights should not be required to pay for the provision of these services. Nevertheless, air traffic controllers assigned to enroute Air Route Traffic Control Centers provide ATC Services to such aircraft (Beaudoin Declaration ¶ 17), and the FAA has included all of the cost of these controllers in the cost pools that are used to set the overflight fees. Clearly, FAA should have excluded costs incurred by FAA to provide services outside of the enroute and oceanic environments, and it was arbitrary and capricious for FAA not to have done so.

[4]GRA, *Analysis of Overflight Costs and Pricing*, March 14, 1997, at 46, 53-54.

and $22 million.[6] These widely disparate statements of FAA's overflight costs raise serious doubts as to the credibility of FAA's latest cost figure, which is significantly higher than all previous representations. At a minimum, FAA was required to try to explain in the Interim Final Rule why the $48.7 million figure is accurate and substantiated, and why the prior representations were not.

VII. FAA's issuance of an Interim Final Rule to impose fees without prior notice to and comment by affected parties violated the APA, 5 U.S.C. 553 *et seq.*

It is possible that FAA could have avoided the substantive defects it made in setting the overflight fees had it preceded the issuance of the Interim Final Rule with a notice of proposed rulemaking, and sought comments from interested parties prior to making the new overflight fee rule effective. *See generally* Preliminary Objections at 10-15, and July 17 Letter, at 1-2. It bears repeating that FAA was required to do so under the APA. Although Congress may, through legislation, direct an agency to disregard the APA's requirements, such a directive must be *express*; it cannot be merely implied. This "express directive" exception does not apply to the new overflight fees. Section 273 of the Federal Aviation Reauthorization Act of 1996 (the *1996 Act*) specified that the FAA should issue the "*initial* fee schedule . . . as an interim final rule . . . ." 49 U.S.C. 45301(b)(2) (emphasis added). No language in the 1996 Act or any subsequent

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[5]*Memorandum from John L. Meche, Deputy Assistant Inspector General for Financial and Information Technology, U.S. Department of Transportation* (Dec. 17, 1999).

[6]House Report 106-622, "Department of Transportation and Related Agencies Appropriations Bill, 2001," May 17, 2000 ("The FAA estimates that $22,100,000 in overflight user fees will be collected during fiscal year 2001").

legislation similarly directs FAA to use an "interim final rule" for a second or other supplemental fee schedule. As the D.C. Circuit stated in *Asiana Airlines, et al. v. FAA*, "once the FAA issued the IFR" for the initial fee schedule, "the APA once again became controlling for all subsequent proceedings . . . ." . 134 F.3d 393 at 398. Where, as here, Congress has been silent as to how the FAA should proceed in the given circumstances, the "express directive" exception to the APA cannot apply.

FAA also has acted contrary to the "ICAO Principles."[7] The ICAO Principles are long established standards -- that the United States has championed -- which govern the conduct of nations in international aviation matters, including specifically the setting of air navigation charges. These Principles require signatory nations, prior to imposing user fees, to engage in "discussions between users and providers in an effort to reach general agreement on any proposed charges." Paragraph 22(ii) of the Principles states that "[i]n any . . . imposition of new charges the airport users should, so far as is possible, be given the opportunity to submit their views to and consult with the airport operator or competent authority." In addition, the "users should be provided with adequate financial information." Paragraph 44 applies these requirements to "changes in air navigation services charges." *See* Preliminary Objections, at 15-16. Thus, FAA not only violated U.S. law in its promulgation of the overflight fee rule, but international requirements as well.

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[7] *Statements by the Council to Contracting States on Charges for Airports and Air Navigation Service*, ICAO Doc. 9082/5 (5th ed. 1997).

CONCLUSION

The FAA has been on notice since at least June 29, 2000 – when a torrent of objections were filed by affected parties – that its new overflight fees were unlawfully promulgated by means of an Interim Final Rule. Since that date the FAA has done nothing to rectify this fundamental procedural defect or to answer the numerous requests for additional information needed by the parties to adequately comprehend, study and comment on the FAA's fee-setting methodology. Since June 29, KPMG and ATC experts Beaudoin and Jengo have provided unrebutted evidence of numerous substantive flaws in the IFR that make plain that the new overflight fees cannot be directly related to FAA's costs of providing ATC Services to overflights.

ATAC has long stated that its members do not object to overflight fees that are promulgated through a transparent, fair, and reasonable process, and which clearly meet the statutory directive that they be directly related to FAA's costs to provide ATC Services to overflights. The FAA's new overflight fees fall far short of these standards, both procedurally and substantively, and thus must be withdrawn.

Respectfully submitted:

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